Supreme Court, U.S.
FILED
SEP 15 1980
MICHAEL RODAK, JR., CLERK

No. 80-223

IN THE

Supreme Court of the United States

October Term, 1980

DONALD D. HOWE, et al.,

Petitioners,

v.

ALLIED VAN LINES, INC., et al.,

Respondents

On Petition for a Writ for Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT ALLIED VAN LINES, INC. IN OPPOSITION TO THE PETITION

SIDNEY L. WICKENHAVER
Three Parkway, 20th Floor
Philadelphia, PA 19102
Telephone: 215-563-0650
Counsel of Record for Respondent Allied Van Lines, Inc.

Of Counsel:
ALISON DOUGLAS KNOX
MONTGOMERY, MCCRACKEN, WALKER & RHOADS

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED

1. Did not the Court of Appeals correctly hold that common carriers may limit their liability by written contract with the United States on shipments of household goods of military personnel, because, in dealing with the Government as shipper at reduced rates, common carriers are exempt from Section 20(11) of the Interstate Commerce Act of 1887 (as amended), by virtue of Section 22 of that Act and other statutory authority?

2. Have not these carriers, in any event, complied with Section 20(11) of the Act?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The case of Donald D. Howe v. Allied Van Lines, Inc. (No. 79-1857 in the Court of Appeals) was consolidated for purposes of briefing and argument in the Court of Appeals with eleven related cases. The parties to the related cases (No. 79-1858 through No. 79-1868 in the Court of Appeals) as they appear in this Court are as follows:

Jerry P. Hill, *Petitioner, v.* Trans-American Van Service, Inc., *Respondent*

United Services Automobile Association, *Petitioner, v.* Aero Mayflower Transit Co., Inc. and United States of America, *Respondents*

Dale DeFrank, *Petitioner, v.* Pyramid Van Lines, Inc., *Respondent*

Norman R. Foley, *Petitioner, v.* American Red Ball Transit Co., Inc., *Respondent*

Donald E. Madonna, *Petitioner, v.* Richardson Transfer & Storage Co., Inc., *Respondent*

Glenn D. Wilkerson, *Petitioner, v.* Engel Van Lines, Inc., and United States of America, *Respondents*

George J. Merkler and June D. Merkler, *Petitioners, v.* Aero Mayflower Transit Co., Inc., *Respondent*

Henry Cevallos, *Petitioner, v.* Vanpac Carriers, Inc., Inc., and Clemmer Moving & Storage Inc., *Respondents*

United Services Automobile Association, *Petitioner, v.* Wheaton Van Lines, Inc., *Respondent*

William F. Blase and United Services Automobile Association, *Petitioners, v.* National Van Lines, Inc., and United States of America, *Respondents*

United Services Automobile Association, *Petitioner, v.* Rocky Ford Moving Vans, Inc., and United States of America, *Respondents.*

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED	vi
STATEMENT OF THE CASE	1
A. Background	1
B. Procedural History	2
C. Facts	3
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. The Court of Appeals Correctly Held That Section 22 of the Interstate Commerce Act, Permitting Reduced Rates for the Government, Exempts the Common Carriers From Section 20(11) of the Act in Their Dealings With the United States as Shipper at Reduced Rates	9
A. The Decision of the Court of Appeals Is Supported by Persuasive Authority of This Court	9
B. The Interstate Commerce Commission Does Not Claim Jurisdiction Over These Rates	11
C. There Is No Meaningful Conflict With a 1978 Decision of the Court of Appeals for the First Circuit	12
D. The United States, as Shipper and Consignor of These Shipments, and Through Which the Petitioners and Their Subrogated Insurer Must Claim, Concedes the Limitation of Liability	13

TABLE OF CONTENTS (Continued)

Page

E. The Motor Carriers Act of 1980, if Relevant to These Cases, Is Not Inconsistent With the Decision of the Court of Appeals 14

II. The Carriers Have, in Any Event, Complied With Section 20(11) 16

A. The Interstate Commerce Commission Has Authorized These Carriers to Offer Rates Dependent Upon a Released Value of the Goods 16

B. The Government and the Carrier Agreed in Writing to Limit the Carrier's Liability on Each of These Shipments 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: Page

Adams Express Co. v. Darden, 265 U. S. 265 (1924) 9

Anton v. Greyhound Van Lines, 591 F. 2d 103 (1978) ...12, 13, 14

Interpretation of Government Rate Tariff of Eastern Central Motor Carriers Ass'n., 332 ICC 161 (1968) 14

Practices of Motor Common Carriers of Household Goods, 95 M. C. C. 138 (1964) 11

Public Utilities Commission of California v. United States, 355 U. S. 534 (1958) 9, 10, 11

Tennessee Products and Chemical Corp. v. Louisville and Nashville Railroad Co., 319 ICC 497 (1963) 11

Transportation of Government Traffic, 131 M. C. C. 845 (1980), 1980 F. C. C. ¶ 36,913 12

United States v. Georgia Public Service Commission, 371 U. S. 285 (1963) 9, 10

Statutes and Regulations:

Constitution of the United States, Article I, Section 8 vi

Interstate Commerce Act of 1887, as amended, 49 U. S. C. § 1 et seq. .....*passim*

Interstate Commerce Act of 1978:

49 U. S. C. § 10721 15

49 U. S. C. § 10762 15

Military Pay and Allowances Act:

37 U. S. C. § 406 ..... vi, 3

Motor Carriers Act of 1980 .....14, 15

32 C. F. R. § 173.1 et seq. .....vii-viii, 10, 17

49 C. F. R. § 1307.201 (MC-505) 16

DOD Directive 4500.34 .....vii-viii, 10, 17

DOD 4500.34-R 10, 15, 17

Other Authorities:

Decision of the Comptroller-General of the United States, May 18, 1959, 38 Comp. Gen. 768 14

Interstate Commerce Commission, 70th Annual Report (1957) 11

Senate Report No. 410 (June 6, 1957), U. S. Code Congressional and Administrative News, 85th Congress—First Session (1957) 12

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Constitution of the United States

Article I,

* * *

Section 8. The Congress shall have Power . . .

To raise and support Armies, . . .

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

* * *

Military Pay & Allowances Act, 37 U. S. C. § 406

§ 406. *Travel and Transportation Allowances: dependents, baggage and household effects*

* * *

(b) In connection with a change of temporary or permanent station, a member is entitled to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor, within such weight allowances prescribed by the Secretaries concerned, without regard to the comparative costs of the various modes of transportation.

(c) The allowances and transportation authorized by subsection (a) and (b) of this section . . . are—

(1) subject to such conditions and limitations;

(2) for such grades, ranks and ratings; and

(3) to and from such places;

prescribed by the Secretaries concerned. . . .

Chapter 1—Office of the Secretary of Defense

SUBCHAPTER F—TRANSPORTATION

PART 173—SHIPMENT AND STORAGE OF PERSONAL PROPERTY

Authority: 5 U. S. C. 301 and 37 U. S. C. 406

Source: 36 FR 23800, Dec. 15, 1971, unless otherwise noted.

§ 173.1 *Purpose.*

This part establishes traffic management policies governing the world wide movement, storage and handling of personal property for military and civilian personnel.

* * *

§ 173.4 *Responsibilities and policies.*

(a) The Assistant Secretary of Defense (Installations and Logistics) is assigned overall policy responsibility for the DOD personal property movement and storage program (hereafter referred to as the program). This responsibility encompasses program review and evaluation.

(b) MTMTS * is responsible, in collaboration with other appropriate DOD components, for the development and periodic review of the program to include its adequacy, standards, efficiency, economy, and cost effectiveness, and consistent with the following:

(1) *Procurement of services.* Services may be procured only from qualified carriers, storage firms and contractors.

(2) *Qualification of carriers, their agents, storage firms, and contractors.* The qualification of car-

* Military Traffic Management and Terminal Service, as Military Traffic Management Command ("MTMC") was formerly known.

riers, their agents, storage firms, and contractors will be based upon:

(i) Appropriate authority to provide the required services.

(ii) Evidence of ability to provide satisfactory service.

(iii) Evidence of satisfactory equipment and facilities, including compliance with established fire standards.

(iv) Evidence of appropriate financial responsibility, ...

* * *

(c) In addition, MTMTS is assigned responsibility for the technical direction, supervision, and evaluation of the traffic management aspects of the program on a worldwide basis, subject to the overall guidance, policies, and programs established by ASD (I&L). In carrying out this function, MTMTS will:

(1) Maintain in a current status a list of qualified carriers.

(2) Publish and maintain in a current status a DOD Personal Property Traffic Management Regulation (4500.34-R) for DOD-wide use by transportation officers in arranging for the movement, storage and handling of personal property.

* * *

(9) Be the sole negotiator, worldwide, with U. S. household goods carriers and storage firms on rates and all other matters incidental to the transportation and storage of personal property.

* * *

STATEMENT OF THE CASE

A. Background

The principal legal issue in this case, as in the related cases decided together by the Court of Appeals, is entirely one of statutory construction. Petitioner Howe contends that he is entitled to the full actual value of his household goods, destroyed by fire in shipment, in spite of an admitted contract for limitation of the carrier's liability (to 60¢ per pound per article) made by the United States Government with the carrier, as shipper of the household goods of its military personnel.

The theory of recovery is that Section 20(11) of the Interstate Commerce Act of 1887, as amended,[1] applies to Government contracts of shipment at reduced rates, and renders the Government's contract with the carrier for the benefit of the military member unlawful and void. The petitioner contends that the carrier is obliged to seek a "released rates order" from the Interstate Commerce Commission in addition to an existing order which already authorizes the carrier to offer, to the general public, tariff rates dependent upon the declared or released value of the property. The carrier (and the United States as *amicus curiae*) successfully contended below that the Interstate Commerce Commission has no jurisdiction over the reduced rates available to the Government under Section 22 of the Act, and that the particular requirements of Section 20(11), designed for the protection of the commercial shipper and general public, were not intended by Congress to apply to Government shipments at reduced rates.

1. The Interstate Commerce Act of 1887, as amended, has been revised and re-codified *without substantive change*, but with considerable change of language, and arrangement, since this case arose. As the case was litigated under the prior law, and the Stipulation of the parties makes reference to the prior law, the District Court and the Court of Appeals continued to use the section numbers and language of the prior law. We will follow this practice.

B. Procedural History

The case of *Donald D. Howe v. Allied Van Lines, Inc.*, (no. 79-1857 in the Court of Appeals) was designated by the District Court as the lead case of some twelve related cases below, raising the same principal legal issue. The parties in *Howe*, unlike the parties in the related cases, had entered into an extended Stipulation with numerous exhibits, which Stipulation was adopted by the District Court as its Findings of Fact. (A1, A9-A10)

The District Court determined that the defendant carrier had effectively limited its liability to 60¢ per pound per article under its contract with the United States, the Government bill of lading issued pursuant to the carrier's Military Rate Tender 1-H. In an opinion (A79-A97) delivered from the bench, the District Court held that Section 20(11) of the Interstate Commerce Act did not apply to shipments by the United States at reduced rates, by virtue of Section 22 of the Act.

On appeal to the Court of Appeals for the Third Circuit, the related cases were consolidated for purposes of briefing and argument. In its opinion, (A28-A52), the Court of Appeals confined its discussion of the facts to the *Howe* case, as typical of the others. (A29) The Court of Appeals affirmed the judgment of the District Court, and also concurred in the reasoning of the District Court, that Section 20(11) does not apply to shipments at reduced rates on Government bills of lading. The Court of Appeals explored *in extenso* the history of Section 20(11) and of Section 22 of the Act. The Court of Appeals found that Congress had not intended, in enacting Section 20(11) by the Carmack Amendment of 1906, and the first and second Cummins Amendments of 1915 and 1916, to limit the Government's power to contract with common carriers for more favorable rates than the regulated tariff

rates, including the power to contract for released value rates.

C. Facts

Military Rate Tender 1-H ("MRT 1-H") was a continuing offer, on the part of some 1,500 participating carriers (including Allied Van Lines) to the Department of Defense, Military Traffic Management Command ("MTMC"), of reduced rates, not available to the general public, on the shipment of household goods of military personnel under Government bills of lading. The "published tariff" of Allied Van Lines, offering rates for shipment of household goods to the general public, from which deviation on any private shipment is a criminal offense, was Tariff No. 175-C. The reduced rates of MRT 1-H are an exception, by authority of Section 22 of the Act, permitting reduced rates for the Government, to the rates of the carrier's published tariff for the general public.

When Donald D. Howe, Petitioner herein, then a lieutenant commander in the United States Navy, made arrangements with the transportation officer at the United States Naval Academy, Annapolis, Maryland, for the shipment of his household goods, Howe was separating from the Naval Service. He was entitled, as a member of a uniformed service making a permanent change of station, to the transportation of his household goods, at Government expense, under 37 U. S. C. 406(b). For its part, MTMC was entitled, by virtue of its acceptance of the carriers' tender of rates in MRT 1-H, to ship Howe's goods at the reduced rates provided in MRT 1-H.

Howe applied to the Navy for the transportation of his goods by signing DOD Form 1299 (A30) on April 26, 1977. At the time Howe made application, he was informed by the Naval Academy's transportation officer

that the carrier's liability on the shipment would be limited to 60¢ per pound per article, and that the shipment would be released by the Government to that valuation upon the Government bill of lading ("GBL").

Howe also signed DOD Form 1797, acknowledging that he had been briefed upon carrier and storage firm liability for loss or damage to his household goods. (A30) There is no question of fact that the nominal petitioner, the military member, had actual notice of the limitation of liability in the contract that would be made by the United States as shipper, for his benefit, with the carrier.

Howe was also informed, at the same time, of his entitlement under federal statute, to claim from the United States up to $15,000 for any *uninsured* loss in the event of loss or damage to his household goods in shipment. Even so, private insurance was recommended, and Howe did insure his household goods for $25,000 with United Services Automobile Association ("USAA"), a private insurer specializing in insurance for military personnel. (A30) After the loss, USAA paid Howe $22,723.77 under his insurance policy. USAA is therefore a real party in interest to the present suit, as subrogated to Howe's rights, to the extent he has recovered upon the policy. USAA is also a real party in interest to each of the related cases, as noted by the Court of Appeals in its opinion. (A30-A31)

The transportation officer at the Naval Academy made the arrangements for the shipment, on a Government Bill of Lading, at Government expense, with the carrier. The transportation officer prepared the GBL. Upon the GBL, the transportation officer, United States Naval Academy, is designated as the shipper. Donald D. Howe is designated as the consignee. The GBL includes the following clause: "HOUSEHOLD GOODS RELEASED AT A VALUATION OF $.60 PER LB PER ARTICLE."

In addition, when Allied Van Line's origin agent picked up the goods at Howe's residence in the grounds of the Naval Academy, it issued the carrier's own bill of lading as a receipt for the goods. The carrier's bill of lading was signed by Howe himself below typewritten words stating that the shipment was released to a value of 60¢ per pound per the GBL.

SUMMARY OF ARGUMENT

The writ should be denied because the Court of Appeals (and the District Court) correctly identified the flaw in each Petitioner's contention that he, and his insurance carrier, were entitled to a windfall gain from the carrier of the full actual value of the goods, in spite of the admitted contract of the United States limiting the carrier's liability, and the consignee military member's admitted knowledge of that contract.

The holding of the Court of Appeals, that Congress did not intend Section 20(11) to apply to Government shipments at reduced rates, is supported by the history of the original enactment of the Interstate Commerce Act, of the several amendments to Section 20(11), and of the 1957 amendment to Section 22 of the Act. It is not contradicted by anything in the recently enacted Motor Carriers Act of 1980, even if subsequent legislation were relevant to these cases, which it is not.

By Section 22 of the Act, part of the original Interstate Commerce Act, Congress expressly excepted government rates from the uniformity of treatment that was the principal purpose of regulation by the Interstate Commerce Commission. The Commission has no jurisdiction over government rates, and therefore has no jurisdiction to issue a "released rates order" directed specifically to the released rates charged to the Government, as Petitioners contend.

On the contrary, other federal statutes, directly concerned with military entitlements, and regulations issued thereunder with the force of law, empower Military Traffic Management Command ("MTMC") to contract with common carriers for the transportation of household goods of military personnel.

A military member whose household goods are shipped at the expense of the government does so subject

to the limitations and conditions laid down by the Secretary of Defense, with the authority of law. The military member, unlike the private citizen, is extensively protected by the Government's procedures, has notice of his rights and entitlements, and may choose the forms and extent of his protection within his statutory entitlement.

No question is raised here of the contract made in fact between the United States and the carrier, consisting of the Government Bill of Lading and the carrier's Military Rate Tender, specifically limiting the carrier's liability to 60¢ per pound per article. The *only* issue raised is whether that limitation was a legal term of the contract between the Government and the carrier. The same terms—but at a higher charge—are offered the general public, under authority of a standing "Released Rates Order," authorized by the Commission in 1967.

Nothing in the Interstate Commerce Act, or elsewhere, prohibits the United States from contracting with carriers for a reduced rate dependent upon a released value of the goods shipped, or requires carriers to obtain a "released rates order" specifically directly to government traffic; nor would the Commission be empowered to issue such an Order.

Even if Section 20(11) applied to government shipments, which it does not, its requirements for the limitation of the carrier's liability have been met. The carriers were authorized by MC-505, effective January 1, 1967, a "released rates order" of the Interstate Commerce Commission, to maintain rates dependent upon a released value for the goods. The Order does not purport to approve a particular level of rates, but authorizes carriers to offer rates of a particular kind. The rates offered the Government on the shipments here at issue were of that kind, but reduced from the rates charged the general public, because Section 22 permits rate discrimination in favor of the Government.

Persuasive authority of this Court, in the context of attempted State regulatory interference with military and government shipments intrastate, powerfully supports the statutory construction and policy considerations adopted and applied, by the Court of Appeals, in the interstate context here presented.

ARGUMENT

I. The Court of Appeals Correctly Held That Section 22 of the Interstate Commerce Act, Permitting Reduced Rates for the Government, Exempts the Common Carriers From Section 20(11) of the Act in Their Dealings With the United States as Shipper at Reduced Rates.

A. The Decision of the Court of Appeals Is Supported by Persuasive Authority From This Court.

No decision of this Court is contrary to the decision of the Court of Appeals. *Adams Express Co. v. Darden,* 265 U. S. 265 (1924), claimed as such in the Petition at 8-9, not only did not involve a government shipment, but was decided under the Interstate Commerce Act as it stood for one year only, after the First Cummins Amendment of 1915. *See* Petition at 5, 6, and 9. The Second Cummins Amendment, enacted the following year, in 1916, contained, in the words of the Court of Appeals "all the relevant language of the current section 20(11)." (A31-A32).

By contrast, *Public Utilities Commission of California v. United States,* 355 U. S. 534 (1958) and *United States v. Georgia Public Service Commission,* 371 U. S. 285 (1963), while not controlling, are persuasive authority for the construction of section 22 of the Interstate Commerce Act adopted below. In those cases, this Court forbade attempts by State regulatory agencies to compel common carriers to file their government rate tenders for the approval of those agencies. This Court found the assertion of State regulation of military (or civilian) tenders in conflict with federal policies of unregulated government rates, a policy manifested by the armed forces procurement statutes. Thus, the attempted State regulation was at variance with the Supremacy clause of the Constitution.

In the *Georgia Public Service Commission* case, this Court pointed to the Military Traffic Management Regulation, 371 U. S. at 288-289, successor to the armed forces procurement statute at issue in the *California* case, and predecessor of DOD Directive 4500.34, under which, in the instant cases, MTMC is appointed "sole negotiator, worldwide, with U. S. household goods carriers and storage firms on rates and all other matters incidental to the transportation and storage of personal property." 32 C. F. R. § 173.4(c)(9) [1978 edition.]

Under that authority, MTMC accepted the carriers' tender of rates here at issue, MRT 1-H, offering rates dependent upon a release of the goods to a value of 60¢ per pound per article. Under the same authority, MTMC promulgates the military regulation, DOD 4500.34-R, prescribing the form in which GBLs are to be prepared and issued by military transportation officers.

In striking down *State* regulation of intrastate government and military tenders, this Court noted the clearly expressed exemption from federal (ICC) regulation in Section 22 of the Act: 355 U. S. at 543, n. 10: "Section 22 of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. § 22, exempts transportation for the United States from the rate provisions of that Act." Indeed, it was the *absence* of statutory authority comparable to Section 22 but relating to *intra*state shipments that was the sticking point for the dissenters in *Public Utilities Commission of California,* 355 U. S. at 547 (Harlan, J., dissenting).

In other words, the *intrastate* case was the hard case, in contrast to the express exemption from rate regulation under the Interstate Commerce Act. Yet Petitioners would now have the ICC assume the jurisdiction (on interstate shipments) which this Court forbade State regulatory bodies to assume (on intrastate shipments) in *Public*

Utilities Commission of California, supra, and in spite of the express exemption in the Interstate Commerce Act for government shipments at reduced rates.

B. The Interstate Commerce Commission Does Not Claim Jurisdiction Over These Government Rates.

Contrary to Petitioners' assertion, at p. 14, the ICC has not "taken the position" that it has jurisdiction over government rates, or such government rates as are dependent upon the declared or released value of the goods. The Commission has held precisely the opposite: that it does not have jurisdiction over Section 22 rates. *Tennessee Products & Chemical Corp. v. Louisville and Nashville Railroad Co.,* 319 ICC 497 (1963).

In *Practices of Motor Common Carriers of Household Goods,* 95 M. C. C. 138 (1964), cited by Petitioner at p. 14, representatives of the Department of Defense appeared as friends of the Commission. From 1962, MTMC had, as a matter of administrative convenience, required carriers submitting tenders to it to offer released rates using the then-current minimum released value approved by the ICC for the carriers' published tariff, 30¢ per pound per article. (MTMC's 1962 directive to carriers was made a part of the record in *Howe* by stipulation.) MTMC therefore had in interest in the 1964 proceedings before the Commission, as a result of which the minimum released value was raised to 60¢ per pound per article on January 1, 1967.

In 1957, ten years earlier, the ICC had asked Congress to give it jurisdiction over government rates, and to limit reduced rates under Section 22 to times of war or emergency. (A40) *See also* Interstate Commerce Commission, 70th Annual Report (1957). The proposal was rejected by Congress. Instead, Congress amended Sec-

tion 22, by adding Section 22(2), requiring carriers to submit *copies* of their government quotations to the ICC, simultaneously with their tender to the government, for public inspection and informational purposes. (A42) The Senate Report accompanying the proposed revision of Section 22, which became law as Section 22(2), expressly provided that "the Commission *would not have any regulatory authority over rates made under Section 22,* but would be required to make section 22 tenders or quotations available for public examination." (emphasis supplied). S. Rep. 410 (June 6, 1957) reprinted in U. S. Code Cong. & Admin. News 1782, 1784. *See also, Transportation of Government Traffic,* 131 MCC 845, 1980 FCC ¶ 36,913, at p. 47, 581 and n. 12.

C. There Is No Meaningful Conflict With a 1978 Decision of the Court of Appeals for the First Circuit.

There is no meaningful conflict between the decision of the Court of Appeals for the Third Circuit in *Howe v. Allied Van Lines* and that of the Court of Appeals for the First Circuit in *Anton v. Greyhound Van Lines,* 591 F. 2d 103 (1978).

There is not even an apparent conflict on Petitioners' principal contention, Petition at 9, that these carriers had not filed tariffs with the ICC pursuant to a "released rates order." In *Anton,* it was *conceded by the plaintiff* that "Greyhound maintained tariff rates approved by the ICC dependent upon the declared value of its shipments." 591 F. 2d at 108.

On Petitioners' secondary contention (which Petitioners concede at p. 10 applies to only three of the related cases for which *certiorari* is sought) there is an apparent conflict with *Anton* because the *Anton* court *assumed* that § 20(11) applied with statutory force to gov-

ernment shipments on government bills of lading at reduced rates. 591 F. 2d at 107.

The application of Section 20(11) was not contested in *Anton,* and Section 22 was not even drawn to the attention of the *Anton* Court. (A49) The *Anton* court noted the applicable Military and Government Rate Tender 1-F (a predecessor to MRT 1-H here at issue) similarly provided that shipments moving on GBLs would be *deemed* released to 60¢ per pound per article, 591 F. 2d at 105, n. 2, but, having incorrectly identified the "shipper" as the military member, and not the Government (A49), gave no effect to this provision. The Court of Appeals in *Howe v. Allied Van Lines Inc.* was confident that, had Section 22 been drawn to the attention of the Court of Appeals for the First Circuit, the result in *Anton* would have been different. (A49)

The other cases, cited by Petitioners at p. 9 as allegedly in conflict with the decision of the Court of Appeals in *Howe,* do not even raise an apparent conflict. See the discussion of the Court of Appeals at A49-A50.

D. The United States, as Shipper and Consignor of These Shipments, and Through Which the Petitioners and Their Subrogated Insurer Must Claim, Concedes the Limitation of Liability.

The Court of Appeals assumed *arguendo* that Petitioners were "holders" of the government bills of lading on which these shipments moved (A33-A34), but noted that Petitioners' rights as "holders" could rise no higher than those of the United States, the shipper and consignor upon the GBLs. (A34) The United States filed a brief as *amicus curiae* in the District Court, supporting the defendants' motion for summary judgment in all these cases, and in the Court of Appeals supporting affirmance of those judgments. The United States argued, as did these

Respondents, that Section 20(11) was inapplicable to government bills of lading by virtue of Section 22 of the Act. (A34) *See also,* Decision of the Comptroller General, May 18, 1959, 38 Comp. Gen. 768.

The Court of Appeals noted that the *Anton* court "mistakenly refers to the military person as the shipper, although it seems clear that the goods were, as here, shipped on a government bill of lading at a declared value of 60 cents per pound pursuant to a general tender to DOD." (A48-A49). See, *Anton v. Greyhound Van Lines Inc., supra,* at 105. Only the Government, not the military member, is entitled to ship at reduced rates under Section 22 of the Act. *Interpretation of Government Rate Tariff of Eastern Central Motor Carriers Ass'n.,* 332 I. C. C. 161 (1968). In the instant cases, Petitioners concede, as they must, that the government was the shipper, Petition at 11, and that the government bills of lading and the military rate tenders were the controlling documents, Petition at 6, 7, and 13.

E. The Motor Carriers Act of 1980, if Relevant to These Cases, Is Not Inconsistent With the Decision of the Court of Appeals.

Petitioners apparently believe that certain provisions of the Motor Carriers Act of 1980, effective July 1, 1980, cast light upon the intent of Congress in 1887, 1906, 1915, 1916, and 1957, in enacting and amending the Interstate Commerce Act of 1887, and, presumably, in repealing and re-enacting that Act without substantive change, in 1978. Petition at 16. Of course, a subsequently enacted statute cannot affect the outcome of cases which arose under prior law. But, in any event, nothing in the Motor Carrier Act of 1980 is inconsistent with the decision of the Court of Appeals.

The Motor Carriers Act of 1980 abolishes the separate requirement for a "released rates order" and permits motor common carriers to offer, as part of their published tariff filing with the ICC, rates in which the carrier's liability is limited to a declared or agreed-upon value (in writing) "if that value would be reasonable under the circumstances surrounding the transportation." Section 12. (A73) However, for household goods, the existing procedures are retained, and the Commission may still authorize *or require* common carriers to offer such rates. These provisions relate to tariff rates filed with the ICC pursuant to 49 U. S. C. § 10762, and not to reduced rates for the United States under Section 10721. While the Motor Carriers Act of 1980 leaves the ICC with power to require released rates from motor common carriers of household goods, that provision cannot affect government tenders, since it was early established that Section 22 is permissive, not mandatory, and gives the Government no power to require reduced rates. The language of Section 10721(b)(1) of the revised Act continues to reflect this. (A62)

The Government, in dealing with common carriers, has always required such common carriers to possess the requisite ICC operating authority. The Tender of Service from carrier to MTMC, prescribed by DOD 4500.34-R as a prerequisite to any tender of rates under Section 22, requires the carrier to certify that it possesses the appropriate ICC authority to operate as a common carrier of household goods. (The Tender of Service so required is published as an Appendix to DOD 4500.34-R, and was made a part of the record below by Stipulation.) The Motor Carriers Act of 1980 does not represent a change in existing provisions, except insofar as a more liberal policy of ICC certification is mandated for all motor common carriers other than carriers of passengers. The effect

of Section 5(b)(4)(c), (A70), is to continue the existing policy, that motor common carriers transporting household goods for the United States should possess ICC authority to operate as a motor common carrier for the general public.

II. The Carriers Have, in Any Event, Complied With Section 20(11)

A. The Interstate Commerce Commission Has Authorized These Carriers to Offer Rates Dependent Upon a Released Value of the Goods.

Petitioners' principal contention, Petition at 9-10, is that the admitted contract of shipment, limiting the carrier's liability to 60¢ per pound per article is illegal and void *because* these carriers have allegedly failed to obtain from the Interstate Commerce Commission a "released rates order" applicable to their military rate tenders. On the contrary, these carriers have obtained the only such order possible. If a released rates order was required, the requirement was satisfied by MC-505, effective January 1, 1967, and published at 49 C. F. R. § 1307.201. The Commission's Order authorizes:

> . . . *each motor common carrier* authorized to perform the specialized service of a household goods carrier . . . to establish and maintain *by filing and posting* in the manner required by the Interstate Commerce Act, *commodity rates* for the transportation . . . of household goods, as defined by the Commission. (Emphasis supplied). (49 C. F. R. § 1307. 201(a))

Petitioner admits the authority of MC-505, but maintains that such Order applies only to the carrier's published tariff for the general public, and not to the Military

Tender; and intimates that the carriers are obliged to apply for a separate authority, from the ICC, to tender "rates dependent upon the value . . . agreed upon in writing as the released value of the property" to the Government. No such additional authority is required.

B. The Government and the Carriers Had Agreed in Writing to Limit the Carriers' Liability on Each of These Shipments.

Petitioners make a secondary contention, applicable to only three of the cases here at issue, Petition at 10, that the agreement between the shipper (the Government) and the carrier on the released value of the shipment was not made in writing. But in each such case (as in all these cases at issue) the applicable military rate tender provided for a release of 60¢ per pound per article, in the absence of any endorsement upon the Government bill of lading to the contrary. Each such tender (made in writing) was accepted (in writing) for the United States by its designated agency, MTMC. The tender itself, and the non-endorsed GBL as provided for therein, *is* an agreement in writing upon the released value as called for by § 20(11), even if Section 20(11) were deemed to apply to these shipments. Section 20(11) nowhere requires that the agreement in writing shall appear upon the face of the bill of lading.

Extensive military regulations, made part of the record below by Stipulation, control the issuance of Government bills of lading for shipments such as those at issue. Those regulations, found in DOD 4500.34-R by authority of DOD Directive 4500.34 (published at 32 C. F. R. §§ 173.1-173.4, 1978 edition; see pp. vii-viii *supra*) instruct the military transportation officer, who prepares the GBL, *not* to endorse the GBL "60¢ per pound per article" where the applicable Military Rate Tender pro-

vides for such limitation in the absence of a contrary endorsement. In those other cases at issue here, including *Howe v. Allied Van Lines,* where "60¢ per pound per article" appears upon the face of the GBL, that writing is—according to the contract between government and shipper—mere surplusage. Even if § 20(11) were controlling here, the "agreement in writing" required by that section is satisfied by the provision of the Military Rate Tender.

CONCLUSION

For all the above reasons, the Writ should be denied. Section 22 of the Act exempts the carriers from Section 20(11) of the Act in their dealings with the Government as shipper at reduced rates. The carriers have, in any case, complied with the provisions of Section 20(11).

Respectfully submitted,

SIDNEY L. WICKENHAVER
Counsel of Record for Respondent
Allied Van Lines, Inc.

Of Counsel:
ALISON DOUGLAS KNOX
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS